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ABSTRACT

This paper reviews court decisions and articles that deal with academic freedom issues in higher education, including tenure, promotion, and post-tenure review. It discusses the Supreme Court decisions in Wieman v. Updegraff (1952), which struck down an Oklahoma loyalty oath; Sweezy v. New Hampshire (1957), which precluded an investigation into the content of a professor's lectures; Keyishian v. Board of Regents (1967), which struck down a New York law requiring state university faculty to sign a non-communist affidavit. More recent cases, including Jeffries v. Harleston (1994), are also reviewed. Statements from the American Association of University Professors regarding academic freedom and tenure are also included, along with a discussion of the difficulty of defining exactly what tenure is. A short list of relevant articles is included. (MDM)

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ACADEMIC FREEDOM ISSUES IN HIGHER EDUCATION: TENURE, PROMOTION, POST-TENURE REVIEW

July 21, 1997

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Although frequently considered as one and the same, academic freedom and tenure are very different animals. When viewed separately, it is often argued that academic freedom is virtually impossible without the protection provided by tenure. Academic freedom, as viewed by the academy, is part of the cultural philosophy that protects freedom of the intellectual environment. From the prospective of the law, academic freedom is a particular package of rights which may be found in the Constitution, statutes and/or contractual provisions. Whatever the source, the shield of academic freedom protects the "academy" from interference with inquiry and expression.

Tenure from the perspective of the law is a property right held by the individual faculty member. Tenure protects the employment of the faculty member except in very limited circumstances such as where "cause" may be found.

I. Academic Freedom

A. Constitutional Protections

Academic freedom rose to the level of a Constitutionally protected right in a

number of cases emerging from McCarthy era attempts to protect the nation's institutions of education from "subversives." In 1952, the Supreme Court in Wieman v. Updegraff, 344 U.S. 183, struck down an Oklahoma loyalty oath. In his concurring opinion, Justice Frankfurter stated:

> The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards. To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole . . .. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them. They must have the freedom of responsible inquiry, by thought and action, into the checkered history of social and economic dogma.

Five years later in Sweezy v. New Hampshire, 354 U.S. 234 (1957), the court precluded an investigation into the content of a lecture Sweezy had given at the University of New Hampshire. In strong language in a plurality opinion, Chief Justice Warren stated:

> The essentiality of freedom in the community of American

> universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

In 1967, in Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Supreme Court struck down a New York law requiring state university faculty members to sign a non-communist affidavit. Writing for the majority, Justice Brennan wrote "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . The classroom is peculiarly the "marketplace of ideas."

The above cases all dealt with outside interference with activities on campus. In another line of cases, the court has dealt with free speech rights and matters of public concern. In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court overturned the

dismissal of a high school teacher who wrote a letter to a local newspaper criticizing school officials' handling of revenue bond proposals. The court found this dismissal to be violative of the teacher's rights of free speech under the First Amendment. In setting out a balancing test, the court stated:

> The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

In a line of cases, including Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), and Connick v. Myers, 461 U.S. 138 (1983), the court would further define this balancing test.

The recent case of Jeffries v. Harleston, 513 U.S. 996 (1994), has given rise to fears that the Constitutional protection of "academic freedom" are being eroded. That case, which deals with the dismissal of an African-American professor by the City University of New York for public expression of his controversial ideas, has a long and tortured history. In 1994, the Supreme Court remanded the case back to the 2nd Circuit Court of Appeals for further consideration in light of Waters v. Churchill, 511 U.S. 661 (1994). In doing so the court seems to have completely ignored the concept of academic freedom and based the decision entirely upon considerations applicable to the free speech rights of any

public employee.

In EEOC v. University of Notre Dame, 715 F.2d 331 (7th Cir., 1983), there was held to be a limited academic freedom privilege regarding confidentiality of peer review materials in the tenure process. The court assumed that confidentiality was an essential element of that process. However, in University of Pennsylvania v. EEOC, 493 U.S. 192 (1990), the Supreme Court found neither a common law nor First Amendment privilege which would override an EEOC subpoena in a discrimination case. See also In re Dinnan 661 F.2d 426 (1981) concerning a University of Georgia professor who was jailed for contempt for failure to reveal his tenure vote.

See Lynda Frost, "Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. EEOC," 17 Journal of College and University Law, 329 (1991).

B. Standards of the Profession

ACADEMIC FREEDOM

a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . .

b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject . . .

c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

1940 Statement on Academic Freedom and Tenure, AAUP Policy Statements

II. Tenure

ten·ure *n.* permanence of position, often granted an employee after a specified number of years. American Heritage Dictionary, Houghton Mifflin Company, 1991.

ACADEMIC TENURE - After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies. 1940 Statement on Academic Freedom and Tenure, AAUP Policy Statement.

The exact meaning and intent of this so-called tenure policy eludes us. Its vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage. Worzella v. Board of Regents, 77 S.D. 447, 93 N.W. 2d 411 (S.D. S. Ct. 1958), quoted by Ann H. Franke, Counsel, American Association of University Professors, in "Attacks on Tenure in the Higher Education Context," American Federation of Teachers Legal Conference, April 9, 1997.

Once again . . . , a practice founded in idealism flounders in application. Those untenured souls judged by their more-than-peers to be oddballs or malcontents can be denied the ultimate security as readily as those obviously inept or slothful. Naturally, this fosters caution and me-tooism on the part of those not yet anointed. They play the game, respect their elders, avoid confrontation, add weight to their *vitae* with whatever they can get published, and generally avoid roiling the waters until the final approval is granted. After that they can say as much and do as little as

they wish. Herbert Livesey, THE PROFESSORS, WHO ARE THEY? WHAT THEY DO? WHAT THEY REALLY WANT? WHAT THEY NEED, 30 (1975).

ISSUES SURROUNDING TENURE

A. Promotion

B. Tenure Revocation

C. Post-Tenure Review

D. Unionization

E. Other

IN DEFENSE OF TENURE

"Tenure Remains Vital to Academic Freedom," an article by James E. Perley, President of the American Association of University Professors, which appeared in the "Point of View" section of the April 4, 1997, *Chronicle of Higher Education*. See also, Merton C. Bernstein, "In Praise of the Tenure: A Cautionary Essay," 71 Wash. U. L. Q. 1017 (1993).

CHALLENGES TO TENURE

- State legislation abolishing tenure or requiring strict periodic review with possible dismissal of tenured faculty.

- Governing boards, proposed or adopted actions against tenure at many institutions, including the University of Minnesota, the City University of New York, and Bennington College.

- Higher education associations. See the American Association for Higher Education, series of white papers: Where Tenure Does Not Reign: Colleges with Contract Systems by Richard Chait & Cathy A. Trower (March 1997); Academic Freedom Without Tenure? By J. Peter Byrne (January 1997); Two Faculties or One? The Conundrum of Part-Timers in a Bifurcated Workforce by Judith M. Gappa and David W. Leslie (April 1997); Innovative Modifications of Traditional Tenure Systems by Richard Chait (1997); Off the Tenure Track: Six Models for Full-Time, Nontenurable Appointments by Judith M. Gappa (December 1996); Post-Tenure Review: Policies, Practices, Precautions by Christine M. Licata and Joseph C. Morreale (March 1997).

- Elimination of mandatory retirement. See Ending Mandatory Retirement for Tenured Faculty: Consequences for Higher Education. The National Research Counsel Report to Congress, May 21, 1991. See also, Robert W. McGee & Walter E. Block, "Academic Tenure: An Economic Critique," 14 Harv. J.L. & Pub. Pol'y 545 (1991).

- Structural changes in the health care system.

- Increases in non-tenure track and part-time faculty